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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1079

MARITIME OVERSEAS CORP., and INTERCONTINENTAL BULK TANK CORP.,
Petitioners,

against

HEROLD O. LINABARY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SHELDON TABAK
Counsel for Respondent
Herold O. Linabary
299 Broadway
New York, New York 10007

ROLNICK TABAK EZRATTY
AND HUTTNER
Of Counsel

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Opinions Below

The unreported memorandum opinion of the District Court, entered June 1, 1973, appears in Petitioners' Appendix, page 9 (a). The judgment of the Court of Appeals, decided without opinion on October 21, 1974, affirming the District Court, appears in Petitioners' Appendix, page 1 (a). The orders of the Court of Appeals denying a rehearing and a rehearing *in banc* were entered on December 2, 1974, and appear in Petitioners' Appendix, pages 3 (a) and 4 (a).

Jurisdiction

Respondent agrees with petitioners' jurisdictional statement. No issue is presented on this point.

Questions Presented for Review

1. Is the decision of the Court below, upholding the District Court, a precedent-setting endorsement of a possibility standard of medical causation?

2. Does the decision of the District Court and of the Court of Appeals create a precedent-setting conflict between the Fifth and Second Circuits and, therefore, manifest inconsistent interpretations of the decision of this Court in *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959)?

Statement of the Case

Respondent does not agree with the statement of the case as presented by the petitioners. It is argumentative and not supported by either the evidence or the latitude given the jury in interpreting the evidence. It is necessary, however, for respondent to discuss the merits of petitioners' version of the case.

Our position in this Court as in the Court below is that there was evidence from which the jury might have reasonably concluded that negligent aggravation rendered surgery mandatory and that in the absence of such negligence, plaintiff's injuries would have healed spontaneously without surgery. Additionally, in the test for causation as applied in FELA and Jones Act cases, the jury only need have found that petitioners' negligence played a part, even the slightest, in producing the injury.

The facts

On September 10, 1970 respondent, an oiler aboard the s/t OVERSEAS ALICE, fell on the after deck sustaining serious injuries to the left knee. Following the accident he was

under the care of Chief Mate Papalios until the vessel docked some thirty-six or so hours later.

Concerning the specific events which transpired during this period of treatment aboard the vessel, the jury heard testimony of the respondent, Chief Mate Papalios and Third Engineer Cadek. They also evaluated certain documentary evidence which included the vessel's Medical Log, Accident Report and Ship's Medicine Chest.

On September 12, 1970, the vessel docked at Martinez. Respondent was discharged and reported the same day to the United States Public Health Service Hospital, San Francisco. Following an examination, X-rays and the application of a soft cast, respondent, not fit for duty but fit for travel, was advised to report to a Public Health facility near his home, Tacoma, Washington.

On September 23, 1970, respondent reported to the United States Public Health Service Hospital in Seattle where surgery was performed on September 28, 1970. Following the surgery, a staph infection developed which both complicated the injuries and increased disability, pain and suffering. As a result, respondent was in a cast until December 8, 1970. Treatment in Seattle continued until August 13, 1971. Next, respondent became a patient at the United States Public Health Service Hospital Outpatient Clinic, Manhattan, New York, and the United States Public Health Service Hospital, Staten Island, New York. A second surgical attempt followed on February 15, 1972, which, as Dr. Sherman stated (A188), "involved cutting away three tendons that come down the inside and back of the leg and normally insert or attach to the inside upper end of the tibia or shin bone."

Following a three month rehabilitation period respondent was again examined by Dr. Sherman on May 8, 1972, and on April 9, 1973. His opinion, stated with a reasonable degree of medical certainty (A203-204), was that "he still

had a severe derangement of the left knee joint following the two operations, and first, of course, the injury. He had a markedly lax medial collateral ligament. He had a lax anterior cruciate ligament. He had traumatic arthritis of the left knee and a severe atrophy of the left thigh and left calf musculature, despite exercise . . . that the atrophy would not improve materially with further exercise, that the arthritis would grow worse with the passage of time and that he was—in my opinion he would never be able to return to work aboard ship, although he would have an earning capacity for work on shore."

While petitioner states that the jury might reasonably have found *some* increase in pain or discomfort due to negligent aggravation during the period September 11, to September 28, they could also have found a *great increase.* Further, no medical evidence compelled a finding that September 28, had to be the cut-off point. They could just as reasonably have concluded that additional pain and discomfort due to negligent aggravation continue into the future. Considering the September 28, surgery as a time reference, it is apparent that all pain and discomfort leading up to it was caused by the initial injury and the aggravation resulting from the failure to properly treat. Looking beyond, into the future, the cause of pain and disability are the initial injury, the negligent aggravation and the unsuccessful surgery. How then can petitioner confidently limit the causative effects of its negligence to a two and one-half week period (September 11-September 28, 1970)?

The non-speculative evidence

Although no statement of fact appears in the memorandum opinion upon which a determination as to which evidence sustained the aggravation issue, petitioner is confident that the source lies in Dr. Harry Sherman. We disagree. Dr. Sherman and Dr. Lodico, medical witnesses

at the trial, were not aboard the ship at the time of the accident; their opinions were the result of information from various sources, which included actual examination of the plaintiff, medical records, and second-hand knowledge of the accident and subsequent events aboard the vessel. On this latter source, the respondent, the Chief Officer and the Third Engineer gave testimony in parts consistent, in parts conflicting. While Dr. Lodico testified that the damage to the knee was caused by the initial impact, the Chief Mate, the ship's medical officer, testified that he observed only light swelling and that he had treated this type of injury many times before.

(A233):

DIRECT EXAMINATION

"Q. Did you also indicate in that report what condition you found when you examined him? A. Well it is on the front over here. Light swelling around the left knee.

Q. Light swelling around the left knee? A. Yes.

Q. That's what you saw? A. Yes.

Q. That was your best judgment of what you saw on his left knee. A. Yes.

Q. If you saw heavy swelling you wouldn't put light swelling, would you? A. No, sir. Well I have no reason to put lies on the injury report."

The Chief Officer had treated this type of injury many times before.

(A252):

CROSS EXAMINATION

"Q. When he reported to you at that time, did you go to the book to determine what treatment he should have? A. Well, I went to the book, medical book and I didn't even have to look in the medical book because that happens many times on ships and I knew the treatment."

(A253-254):

> "Q. You know everything in this book? A. Well, I don't know everything in the book but when I am in doubt I look at the book. That happens to me many times. I bump my knee myself, and I use the same treatment."

(A257):

> "Q. Did you examine and compare both knees? A. Yes.
>
> Q. And from your comparison of both knees, you said it was a little swollen? A. Yes."

A permissible inference that the jury could have drawn from this testimony was that the initial injuries to the knee may not have been as severe as Dr. Lodico categorically stated had to occur immediately upon the initial blow and, further, that healing without surgery may have followed had proper medical treatment followed. Dr. Sherman's report of April 11, 1973 (plaintiff's Ex. 22) provided a medical basis for such an inference:

> "Many injuries of the knee joint involving medial meniscus and medial collateral ligament will go on to spontaneous healing with proper treatment. Many doubtless require surgery despite proper treatment; however, lack of such proper treatment almost certainly changes a potential non-surgical condition into an absolutely surgical one."

We urge that the jury could have accepted this aspect of the Chief Mate's testimony and still found him negligent. It was for the jury to determine what a reasonable Chief Mate would have done under circumstances described as "light swelling". They were not bound to accept the custom and practice of the trade. Further, we point out that, with the plaintiff being under the Chief Mate's care

for thirty-six hours following the accident, the jury could have found negligent conduct in *any number of events in which* the Chief Mate participated. Plaintiff testified that he requested hospital privileges and complete rest, that he was required to go up and down stairs to the mess hall, back and forth to the bathroom, that he was denied the use of a cane or crutch, that he was instructed to use hot epsom salts and compresses,[1] that finally he had to make several trips without assistance in removing all his gear from the vessel. All of the above events were incorporated into a hypothetical question put before Dr. Sherman upon which he was asked:

(A171-176):

> "Q. Doctor, with a reasonable degree of medical certainty, do you have an opinion as to whether or not the facts as I have asked you to assume, aggravated the condition of the left leg and left knee?"
>
> * * *
>
> "Q. Do you have an opinion? A. My answer is yes. I do have an opinion.
>
> The Court: That you can express with reasonable medical certainty?
>
> The Witness: Yes, sir.
>
> Q. Doctor, if I repeated the same question in pertinent parts, do you have an opinion whether or not the conditions caused an increase in pain and disability? A. I have an opinion as to that, also.

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[1] The adverse effect of this treatment was brought out in cross-examination of Dr. Sherman. (A215).

> "Q. Let me ask you, do you agree with this statement: 'Mild massage with a liniment is also of value though usually less effective than heat?' A. . . . As a matter of fact, if it it not done properly, it may make it worse.
>
> The Court: I was going to say it may aggravate a condition, is that right?
>
> The Witness: It may, it frequently does, your Honor."

Q. Will you please state your opinion with a reasonable degree of medical certainty? A. My opinion is first, the facts which you gave me would increase pain and disability. Secondly, on the facts as you gave me, it would materially aggravate and worsen the conditions in Mr. Linabary's left knee."

(A192):

"Q. Doctor, without repeating the hypothetical question again, in your opinion and with a reasonable degree of medical certainty, were the facts I asked you to assume earlier the competent producing cause for necessitating the operations and treatment as you outlined up until this time? A. Yes, they were."

It is submitted that both the Court below and the District Court were correct in their opinion that sufficient evidence did exist to permit a finding that petitioners' conduct was the proximate cause of the aggravation of the respondent's injuries.

Reasons for Denying the Writ

I. Where the criteria for acceptance of certiorari in FELA and Jones Act cases are lacking, and no basis exists upon which to argue conflicts with a decision of this Court and between the Second and Fifth Circuits and, further, where the sole question presented is the sufficiency of evidence, certiorari should not be granted.

The memorandum opinion of the District Court affirmed by the Court of Appeals for the Second Circuit states only a conclusion of law without supporting facts. No basis exists to determine the principle of law upon which it is founded. Therefore, a discussion of conflicts with an opinion of the United States Supreme Court as well as between and within circuits is inappropriate and premature.

A review of the great number of FELA and Jones Act cases in which the Supreme Court reviewed the sufficiency of evidence relating to an employer's negligence as the cause of an injury or death, examined within the guidelines of Rule 19 (Supreme Court Rules), might very well lead one to conclude that the Court has expended considerable effort outside the normal scope of its business. However, a fair reading of these cases decided indicates that a consistent policy underlies the generous granting of certiorari. We believe this policy is rooted in both an awareness that the intent of the Act is to provide liberalized recovery, consistently demonstrated by an almost unbroken string of decisions favorable to the employee,[2] and a recognition by certain members of the Court that a Seventh Amendment Constitutional question is at issue, *Rogers* v. *Missouri*, 352 U.S. 500 (1957); *Inman* v. *Baltimore & Ohio R. R.*, 361 U.S. 138, 146 (1959), dissenting opinion per J. Douglas; *Harris* v. *Pennsylvania R. R. Co.*, 361 U.S. 15 (1959). Concurring opinion per J. Douglas, Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 HARV. L. REV. 1441 (1956); Comment, *Federal Employees Liability Act—Certiorari Practice—Review of the Sufficiency of Evidence*, 6 VILL L. REV. 549, 553 (1961); Note, *Federal Employers Liability Act, Apostasy of Sufficiency of Evidence Policy*, 4 MISS L. J. 418, 421 (1971).

If the above considerations be sufficient to explain the policy in granting certiorari, it then becomes significant that in the instant petition, all such considerations are lacking. Stated in its most simplistic elements, the matter now before this court represents nothing more than petitioners' dissatisfaction with a jury finding that its negligence

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[2] During the period 1938 through 1954, 260 petitions for certiorari in FELA cases were filed; 149 dealt with sufficiency of evidence issues; 37 petitions were granted and the Court approved the removal of the case from the jury in only 5 cases and, in each, the decision was 5 to 4. Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 HARV. L. REV. 1441 (1956).

caused respondent's injuries. Although petitioner has presented the matter in the form of legal conflicts between the Second and Fifth Circuits, within the Second Circuit and with a decision of this Court, closer appraisal will reveal that a proper foundation to support this contention does not exist.

We take the position that before one can discuss the legal principles of a case (on any level much less in a Supreme Court forum) one must determine the underlying principle or ratio decidendi. It is the ratio decidendi which forms the authoritative element of the case. Lacking such an authoritative element, the case represents no precedent. Much has been written on the proper methed of determining this authoritative element.[3] There is, however, a common theme which involves the relationship between the *facts* and the *conclusions* of a case as written in a judicial opinion. We submit that there must exist a written opinion stating not only a conclusion but also the facts. It is here that we take issue with petitioners' attempt to mold, shape, or otherwise present the proceedings in the Courts below as full-dressed legal conflicts. As correctly stated by petitioner, the only pertinent opinion to result from the barrage of legal activity below was the memorandum opinion of District Judge Weinfeld. We point out that this opinion contained only two sentences of significance to the petitioners' cause:

"Admittedly, his testimony contained contradictions, but there was sufficient evidence, if believed to permit a finding that defendant's conduct was the proximate cause of the aggravation of plaintiff's injuries, including the surgical procedures. (opinions omitted) The evaluation of his testimony, in the light of its contradictions, was for jury determination."

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[3] For an informative discussion of this topic see Goodhart, *The Ratio Decidendi of a Case*, 40 YALE L. J. 161 (1930).

It is abundantly obvious that Judge Weinfeld did nothing more than to state conclusions. All that can be fairly said is that he found that contradictions existed but that sufficient evidence also existed to submit the case to the jury. Nowhere does he state any facts forming a basis for his conclusion. The facts supporting petitioners' entire legal analysis presented here as well as in the Courts below have been supplied by petitioner! By appending these selected facts to the conclusions in the memorandum opinion, petitioner has now skillfully attempted to raise it to a precedent-setting stage, exhibiting conflicts not only with this Court but on inter and intra circuit levels. In effect, we have a novel situation in which the case posture as presented has been created through the efforts of the petitioner *and* the District Court Judge, the one supplying the facts, the other the conclusions of law.

We suggest that this approach is an unacceptable method of seeking certiorari, lacking in many respects the clearness and sharpness of legal issues needed for Supreme Court review. We further suggest that what occurred in the Second Circuit, namely, an endorsement of the District Court memorandum opinion, does not raise the opinion to a precedent-setting level. The Second Circuit endorsement can in no way be said to stand for a possibility standard proposition. We urge that before this Court accept a petition requesting that a "conflict" between circuits be resolved, it first assure itself that true conflict exists as authoritatively embodied in the opinions of the respective circuits and, further, that the issues at the heart of the alleged conflict have been squarely presented to and clearly decided by the respective circuits.

Intrinsic to our analysis of the proceedings below are two deductions:

1. Factors supporting Supreme Court certiorari policy in granting FELA and Jones Act petitions are lacking; and

2. Inter and intra circuit conflicts as well as a conflict with an opinion of this Court cannot be intelligently dis-

cussed on the strength of the two sentence memorandum opinion.

If we are correct in our analysis, then the single issue remaining is whether certiorari should be granted to review a judgment where the sole issue is the sufficiency of evidence necessary for a jury determination, and the only persons to be affected by the outcome are the petitioner and respondent.

On this point, we are not without authority, for this Court has addressed itself to this issue consistently expressing the opinion that the Supreme Court of the United States will not grant a writ of certiorari merely to review the evidence or inference drawn from it. *General Talking Pictures Corporation* v. *Western Electric,* 304 U.S. 175 (1938); *Southern Power Company* v. *Northern Carolina Pub. Service,* 263 U.S. 508 (1924); *United States* v. *Johnston,* 268 U.S. 220 (1925); *National Labor Relations Board* v. *Waterman S. S. Corp.,* 309 U.S. 206 (1940).

II. The decision of the District Court and of the Court of Appeals creates no conflict between the Fifth and Second Circuits and, therefore, does not manifest inconsistent interpretations of this Court in *Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U. S. 107 (1959).

Petitioner maintains that the Court below, upholding the District Court, endorsed a remote possibility standard of medical causation in conflict with the decisions of this Court and its own decision of *Fitzgerald* v. *A. L. Burbank & Co.,* 451 F. 2d 670 (2nd Cir. 1971), and *Henry & Braye* v. *A/S Ocean et al.,* Nos. 73-2153, 73-2868 (2nd Cir., Jan. 6, 1975). In addition, petitioner claims that this Court's decision of *Sentilles* v. *Inter-Caribbean Shipping Co.,* 361 U.S. 107 (1959), needs to be clarified as to whether it stands for a possibility standard of medical causation allegedly approved by the Fifth Circuit in *Central Gulf Steamship Corp.* v. *Sambula,* 405 F. 2d 291 (5th Cir. 1968),

and allegedly followed by the District Court and Court of Appeals herein, or a probability standard pursuant to *Fitzgerald* and *Henry & Braye.* Thus, petitioner asserts a conflict of circuits. Petitioner juxtaposes the possibility standard with jury speculation.

Assuming that the decisions of the District Court and Court of Appeals are precedent-setting, which they are not, petitioner nevertheless has created a conflict between circuits and within the Second Circuit where no conflict exists. Both circuits have followed a liberal standard of causation in line with *Sentilles,* which is clear in its language and intent. Emphasizing the labels "possibility", "probability", and "speculation" is misleading and contrary to the meaning of *Sentilles.* Assuming, arguendo, that such labels are appropriate, there is nonetheless no conflict.

Petitioner has chosen to limit its quotation from *Sentilles* to "most likely causes" and "the accident probably aggravated his condition". In *Sentilles,* in response to a hypothetical question as to the effect of an accident on the activation of a pre-existing, dormant tubercular condition, one medical specialist stated that the condition of the petitioner therein *might* be a consequence of the accident. Another specialist stated that the trauma and a pre-existing diabetic condition were the likely causes of the activation, *but made the qualification* that he was not able to state "which of the two is more likely was responsible in this instance". Still another medical expert was of the opinion that the accident "probably aggravated his condition", *but made the qualification,* "We don't ever select one item and say it is the cause of the particular aggravation". 361 U.S. at 109 (emphasis added). The Court stated that even absence of medical testimony or lack of medical unanimity is not controlling.

A more careful reading of *Sentilles* thus demonstrates not only the above qualifications and the use of *might* but, more importantly, suggests that such labelling itself is

inappropriate. *"The matter does not turn on the use of a particular form of words by physicians in giving their testimony."* 361 U.S. at 109 (emphasis added).

Sentilles concluded that a case should not be taken away from the jury merely because there are inconsistent and uncertain inferences. 361 U.S. 110.

Petitioner would have us believe that the memorandum decision (9a of Petitioners' Appendix) of Judge Weinfeld, affirmed by the Court of Appeals (2a of Petitioners' Appendix), citing *Central Gulf Steamship Corp.* v. *Sambula,* 405 F. 2d 291 (2nd Cir. 1968), determines the standard of medical causation of the Second Circuit and, thereby, creates a conflict within the Second Circuit and between the Fifth and Second Circuits.

However, the District Court correctly suggests the standard for the Second Circuit by reference to *Armstrong* v. *Commerce Tankers Corp.,* 423 F. 2d 957 (2nd Cir. 1970), *cert. denied,* 400 U.S. 833 (1970), and *Evans* v. *S. J. Groves & Son,* 315 F. 2d 335 (2nd Cir. 1968). Both *Armstrong* and *Evans* not only posit the standard for the Second Circuit in line with *Sambula,* but also demonstrate that the Second and Fifth Circuits need no clarification of *Sentilles.*

In *Armstrong,* the Court, determining that the sole issue upon appeal was sufficiency of evidence, in granting a motion for judgment n.o.v., viewed the evidence in the light most favorable to the party other than the movant, and stated that the test is "whether there is *complete absence of probative evidence* to support a verdict for the movant". 423 F. 2d at 958 (emphasis added). Again, arguendo, if we are to think in terms of "possibility-probability", the Second Circuit standard herein is even more liberal than if it were within the possibility range. It is certainly not confined to probability. Also, it should be mentioned that only where there is no probative evidence, does the jury enter the realm of "sheer surmise and conjecture." 423 F. 2d at 960.

In *Evans*, there was medical testimony that a thrombosis *could be* caused by the injury and that a resultant condition *could* develop. "We think the jury could infer from this evidence, at least *in the absence of proof that such an occurrence was medically impossible*, that in a given case the two causes had cooperated to bring about the result. . . . It is true that no medical expert testified specifically as to the *possibility* of such cooperative causation," 315 F. 2d at 349 (emphasis added). Again, we are, at the most, within the possibility range. See also *Collins* v. *Penn Central Transportation Company*, 497 F. 2d 1296, 1297 (2d Cir. 1974), reaffirming the Second Circuit position in *Armstrong* and *Evans*.

Sambula, in the Fifth Circuit, and *Evans* and *Armstrong* in the Second Circuit, do not stand for differing legal standards of medical causation. *Sambula*, while using the "possibility" label, even quotes *Sentilles* for the proposition that there are no magic words, that a particular choice of words by the physician does not determine a case. Again, for the sake of argument, if we are to use labels, *Evans* and *Armstrong* stand more for "possibility" than "probability." In any case, both circuits give the jury the widest latitude: "'Courts are not free to reweigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.' *Tenant* v. *Peoria and P.U.R. Co.*, 321 U.S. 29, 35 . . ." *Sambula*, 405 F. 2d at 301, quoting *Sentilles*, 360 U.S. at 110. "A jury's verdict is not likely to be set aside" unless there is no probative evidence. *Armstrong*, 423 F. 2d 959, 960.

In *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 506 (1957), the Supreme Court, in a case involving sufficiency of evidence, held that the test of causation is "whether the proof justified with reason the conclusion that employer negligence played any part, even the *slightest*, in producing injury or death for which damages are

sought" (emphasis added). In addition, the Court observed that the right to a jury determination is paramount, and that special important reasons for a review are present when litigants have been deprived of their right to a jury determination. 352 U.S. at 510.

Petitioner, surprisingly, has placed extraordinary emphasis on *Fitzgerald* v. *A. L. Burbank & Co.*, 451 F.2d 670 (2nd Cir. 1971), and *Henry & Braye* v. *A/S Ocean*, Nos. 73-2153, 73-2868 (2nd Cir. Jan. 6, 1975).

Fitzgerald cites *Rogers* and *Sentilles* for the same propositions which respondent has mentioned herein: Proof of negligence may be based upon an employer playing any part, even the slightest, in producing the injury or death. The jury may decide whether there is proximate cause even in the absence of medical testimony. Also, *Fitzgerald* as does *Armstrong*, states that the jury is not permitted to speculate on proximate cause in the absence of reasonably persuasive proof, but *Fitzgerald* indicates that the jury may, in certain cases, decide the case even counter to medical testimony or causation. 451 F. 2d at 681. Respondent takes no issue with these positions.

On the other hand, petitioner quotes from 451 F. 2d 681 wherein the label "probability" appears. Respondent feels that here petitioner is grasping at straws. *Fitzgerald* is not determinative of the Second Circuit on this point. *Fitzgerald* used the label "probability" in a paragraph discussing a *prima facie* case. 451 F. 2d at 681. It should be noted that *Fitzgerald* does not rely upon nor interpret *Sentilles*, but cites a Fifth Circuit case, *Rewis* v. *The United States*, 369 F. 2nd 595 (5th Cir. 1966), indicating the inappropriateness and futility of petitioners' attempt to create a disparity between the Second and Fifth Circuits based upon the magic words "possibility" and "probability", unless petitioner wishes to concede that *Fitzgerald* misinterpreted the Fifth Circuit and should have adopted a possibility standard in line with *Sambula*. Since *Fitzgerald* is not relying upon nor interpreting *Sentilles*, but is

looking to the Fifth Circuit, wherein petitioner claims the possibility standard exists, petitioner should re-examine its improper emphasis on "possibility-probabality" labels and should look to *Sentilles* for clarity on the use of particular words.

Petitioner maintains that *Henry & Braye,* Nos. 73-2153, 73-2868 (2nd Cir. Jan. 6, 1975), reaffirms petitioners' interpretation of *Fitzgerald.* In *Henry & Braye,* the Court stated that Braye was obligated to offer *some* reasonable proof that his injuries were proximately caused by the defendant. Here, the Court cited *Fitzgerald,* on the issue of speculation. As in *Armstrong,* in *Henry,* "the jury was left with *no* competent proof of causation." *Henry,* slip opinion, page 1153 (emphasis added). Nowhere in the decision does the question of "probability-possibility" arise. *Sentilles* is mentioned for the proposition that that the medical testimony need not be introduced in every case. The liberal Second Circuit standard of *Armstrong* and *Evans* is reaffirmed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

Dated: New York, New York
March 26, 1975.

Respectfully submitted,

SHELDON TABAK
Counsel for Respondent
Herold O. Linabary
299 Broadway
New York, New York 10007

ROLNICK TABAK EZRATTY
AND HUTTNER
Of Counsel